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No. 08-1133

IN THE
Supreme Court of the United States

FRANK D. WUTERICH,
Staff Sergeant, United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The decision below was one of a long line of divided Court of Appeals for the Armed Forces (CAAF) rulings broadly construing military appellate courts' jurisdiction.[1] In *United States v. Denedo*, 129

[1] *See, e.g., Loving v. United States*, 68 M.J. 1 (C.A.A.F. 2009) (asserting the CAAF's habeas jurisdiction after military appellate review became final under Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876); *United States* v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (asserting the CAAF's jurisdiction over intermediate military appellate courts' rulings on prosecution appeals); *Kreutzer v. United States*, 60 M.J. 453 (C.A.A.F. 2005) (issuing writ of mandamus to compel change in confinee's custodial status); *United States v. Leak*, 61 M.J. 234

S. Ct. 2213 (2009), this Court reviewed one such divided CAAF opinion dealing with the temporal length of that court's jurisdiction to review cases. This case, on the other hand, deals with the breadth of the military appellate courts' jurisdiction. The United States itself has objected to the CAAF's repeated "efforts to expand its role beyond its congressionally prescribed jurisdiction to 'review * * * specified sentences imposed by courts-martial.'" Petition for Certiorari at 24, *United States v. Denedo*, 129 S. Ct. 2213 (2009) (No. 08-267), 2008 WL 5693433 (alteration in original) (quoting *Clinton* v. *Goldsmith*, 526 U.S. 529, 534 (1999)).[2]

In its decision below, the CAAF construed statutory language authorizing a prosecution appeal of a trial-level ruling "which excludes evidence"[3] to allow the appeal of an order quashing a subpoena. That decision's interpretation of the military justice system's prosecution appeal statute conflicts with the statute's plain meaning and relies on Article III courts' opinions construing a materially different statute. Given the frequency with which the CAAF has issued divided opinions concerning the breadth of military appellate courts' jurisdiction and the United States' own concern that many of those opinions overstepped the CAAF's jurisdictional

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(C.A.A.F. 2005) (asserting the CAAF's jurisdiction over a finding of guilty set aside pursuant to a Court of Criminal Appeals' special statutorily authorized factual insufficiency review).

[2] In support of this argument, the United States cited *Lopez de Victoria*, 66 M.J. 67; *United States v. Tamez*, 63 M.J. 201 (C.A.A.F. 2006), *overruled by United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009); *Loving* v. *United States*, 62 M.J. 235 (C.A.A.F. 2005); *Kreutzer*, 60 M.J. 453; and *Goldsmith* v. *Clinton*, 48 M.J. 84 (C.A.A.F. 1998), *rev'd*, 526 U.S. 529 (1999).

[3] 10 U.S.C. 862(a)(1)(B) (2000).

limits, review is appropriate to provide the CAAF with further guidance concerning the proper construction of military appellate courts' jurisdiction-granting statutes.

Respondent counters that the CAAF correctly ruled that an order quashing a subpoena is an order that "excludes evidence" for purposes of Article 62(a)(1)(B) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 862(a)(1)(B). In reaching this conclusion, however, Respondent relies on the ruling's supposed "practical effects" rather than its actual terms, thereby violating the principle that statutes will not be construed to grant jurisdiction by implication. Respondent also relies on precedent construing 18 U.S.C. 3731, the federal civilian prosecution appeal statute. But unlike 18 U.S.C. 3731, Article 62 of the UCMJ does not include a liberal construction clause. Respondent also argues that this case's interlocutory status renders certiorari inappropriate. But a portion of Respondent's argument is now obsolete due to subsequent events. Additionally, this Court has granted certiorari to review jurisdictional challenges to other CAAF rulings despite their interlocutory nature, including at the United States' request in the recent case of *United States v. Denedo*, 129 S. Ct. 2213 (2009). Certiorari is similarly appropriate here to review the CAAF's decision on an important issue concerning the military appellate courts' jurisdiction.

A. The CAAF's decision conflicts with Article 62's plain language

1. Article 62(a) of the UCMJ allows the prosecution to appeal a ruling that "excludes evidence." 10 U.S.C. 862(a). Contrary to

Respondent's argument, Opp. 7, the trial judge did not exclude the evidence sought by the prosecution's subpoena. Rather, the trial judge expressly declined to rule on whether the evidence that the prosecution sought with its subpoena would be admissible if a party were to offer it. *See* Pet. App. 36a & 36a n.1 (Ryan, J., dissenting). While the trial judge quashed the prosecution's subpoena, he never suggested that the subpoenaed materials could not be admitted if the prosecution obtained them by other means.

2. Rather than relying on the challenged ruling's actual terms, Respondent discusses its "practical effect." Respondent argues that the "practical effect of the military judge's order was to exclude petitioner's pretrial statements from the court-martial." Opp. 7. This argument fails for two reasons. First, concluding that an appellate court has jurisdiction to review a ruling based on its "practical effect" rather than its actual terms would offend the canon of statutory construction that "jurisdiction of courts is neither granted nor assumed by implication." 3A Norman J. Singer, *Statutes and Statutory Construction* § 67.3 (6th ed. 2000). Respondent appears to suggest that while the trial judge's ruling does not fall within Article 62's plain meaning, Congress impliedly included it within Article 62's scope because its effects are similar to those of rulings that do fall within Article 62. That argument should be rejected when construing a jurisdiction-granting statute that does not include a liberal construction clause. And such a jurisdiction-by-implication argument is particularly inappropriate when construing a statute granting jurisdiction to an Article I court, since such statutes are to be construed strictly. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 908-09 n.46 (1988);

Comm'r v. McCoy, 484 U.S. 3, 7 (1987) (per curiam). Second, as Judge Ryan observed below, had it stood, the trial judge's ruling might not have had the practical effect of excluding the subpoenaed materials from Petitioner's court-martial; further negotiations might have resulted in CBS News providing some or all of the outtakes to the prosecution. *See* Pet. App. 47a (Ryan, J., dissenting).

3. Quoting a Senate committee report, Respondent contends that "Congress expressly stated that Article 62 would permit an appeal 'under procedures similar to an appeal by the United States in a federal civilian prosecution' and that Article 62 '[t]o the extent practical * * * parallels 18 U.S.C. § 3731.'" Opp. 8 (alterations in original) (quoting S. Rep. No. 53, 98th Cong., 1st Sess. 6, 23 (1983)). But Congress does not speak through a committee report of a single house. Rather, Congress speaks through statutes. The federal civilian and military prosecution appeal statutes are different in a key respect: the former includes a liberal construction clause while the latter does not. *Compare* 18 U.S.C. 3731 *with* 10 U.S.C. 862. Even if it were appropriate to examine Article 62's legislative history to construe its terms, the report suggests that the Senate Armed Services Committee considered a liberal construction mandate impractical for the military's prosecution appeal statute since Article 62 departs from its 18 U.S.C. 3731 model by omitting such a clause.

4. Respondent appears to erroneously suggest that Petitioner argued that this Court should grant certiorari due, in part, to the conflict between the opinion below and the Court of Military Appeals'[4]

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[4] The Court of Military Appeals is the CAAF's former name. Congress changed the court's name in 1994. *See* National

earlier decision in *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985). Opp. 9-10. Petitioner discussed *Browers* due to its compelling plain language analysis of Article 62(a). *See* Pet. 8, 11. This Court should grant certiorari not because the opinion below conflicted with *Browers*, but rather because the opinion below conflicted with the plain meaning of a congressional statute as demonstrated by *Browers*.

B. Case law construing the materially different federal civilian prosecution appeal statute is inapposite

Respondent seeks to rely on Article III case law construing 18 U.S.C. 3731. Opp. 7. That statute, however, includes a liberal construction mandate that Congress did not include in Article 62. Case law construing 18 U.S.C. 3731 is, therefore, irrelevant to Article 62's proper construction. When Congress omitted a liberal construction clause from the military's prosecution appeal statute, it left intact the general rule that "the Government [cannot] take an appeal in a criminal case without express statutory authority." *United States v. Wilson*, 420 U.S. 332, 336 (1975) (citing *United States v. Sanges*, 144 U.S. 310 (1892)). In arguing to the contrary, the United States relies, in part, on a CAAF decision that it had previously contended was wrongly decided. *Compare* Opp. 8 (citing *Lopez de Victoria*, 66 M.J. at 70-71) *with* Petition for Certiorari at 24, *United States v. Denedo*, 129 S. Ct. 2213 (2009) (No. 08-267), 2008 WL 5693433 (characterizing *Lopez de Victoria* as a case in which the CAAF "expand[ed] its

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role beyond its congressionally prescribed jurisdiction").

C. The question presented is important and warrants this Court's review

1. Construing Article 62 overly broadly harms both the military's interest in efficiency and service members' speedy trial rights. Respondent's argument to the contrary is internally inconsistent. First, Respondent posits that any argument that the "CAAF's interpretation of Article 62 threatens efficiency and the speedy trial rights of soldiers is also unfounded." Opp. 10. Respondent then appears to concede that such a threat does exist when it observes that "[a]ny interlocutory appeal authorized by Article 62 causes a trial delay." *Id.* That is precisely why it is imperative that Article 62 not be construed more broadly than its plain language dictates.

2. This case demonstrates both the interference with military efficiency and the threat to service members' trial rights that can occur as the result of a prosecution appeal. While a prosecution appeal is pending before one of the military's intermediate appellate courts, trial-level proceedings are automatically stayed. Rule for Courts-Martial 908(b)(4), *Manual for Courts-Martial, United States* (2008 ed.). Petitioner's court-martial has been halted for more than 18 months by two successive prosecution appeals. The second prosecution appeal was entirely an outgrowth of the CAAF's failure to dismiss the first on jurisdictional grounds. Upon remand of the first prosecution appeal, the trial judge held that the outtakes the United States sought from CBS News were protected by a

newsgathering privilege. The United States appealed that ruling, resulting in a second stay in Petitioner's court-martial, and an intermediate appellate court recently reversed it. Had the CAAF held that Article 62 does not permit a prosecution appeal of an order quashing a subpoena, the proceedings that led to the second prosecution appeal would not have occurred and Petitioner's court-martial would no doubt have been resolved long ago.

Congress designed the military justice system to simultaneously foster good order and discipline and protect service members' rights. *See Denedo v. United States*, 66 M.J. 114, 123 (C.A.A.F. 2008), *aff'd*, 129 S. Ct. 2213 (2009). Both of those goals are thwarted if a UCMJ provision is construed overly broadly with the effect of delaying resolution of a court-martial for a year-and-a-half. A desire to minimize such ill effects likely explains why Congress omitted from Article 62 the liberal construction clause that it included in the federal civilian prosecution appeal statute. The negative consequences that prosecution appeals impose on the military and individual service members—negative consequences that will be reduced if this Court were to conclude that the CAAF opened the door for military prosecution appeals too broadly—provide further support for granting certiorari.

3. This case's interlocutory posture does not warrant denial of the petition. Respondent's argument that the ongoing proceedings in Petitioner's case counsel against review was based, in part, on the possibility that the trial judge's second order quashing the subpoena—this time on newsgathering privilege grounds—might be upheld on appeal. Opp. 11. Since Respondent filed its reply, however, the Navy-Marine Corps Court of Criminal

Appeals rejected the applicability of any newsgathering privilege to the military justice system and reversed the trial judge's ruling quashing the subpoena. *United States v. Wuterich*, __ M.J. __, No. NMCCA 200800183 (N-M. Ct. Crim. App. Aug. 31, 2009) (en banc) [hereinafter *Wuterich III*]. But CBS News is unlikely to acquiesce to a military intermediate appellate court's decision. Rather, it will likely pursue relief from other courts either within or outside the military justice system. The resulting delay will further undermine the military's interest in efficiency and Petitioner's interest in seeking a prompt acquittal.

Nor does the possibility of an acquittal once court-martial proceedings finally resume render certiorari inappropriate. A year ago, this Court granted the United States' petition for certiorari in *Denedo* even though the CAAF had remanded the case for further proceedings that might have resulted in the denial of former-Petty Officer Denedo's petition for a writ of error coram nobis. *United States v. Denedo*, 129 S. Ct. 622 (2008). Similarly, in *Solorio v. United States*, this Court granted certiorari to review a subject-matter jurisdiction challenge to Petty Officer Solorio's court-martial even though the Court of Military Appeals had remanded the case for trial, which could have resulted in his acquittal. *Solorio v. United States*, 476 U.S. 1181 (1986). Here, too, the jurisdictional question presented is sufficiently important to consider regardless of the possibility that Petitioner ultimately might be acquitted.

4. In the Navy-Marine Corps Court's recent ruling on the second prosecution appeal in this case,

three of the court's eight judges who participated in the en banc decision endorsed Judge Ryan's dissent from the CAAF's *Wuterich* opinion and declared that they "are troubled by the attenuation of the jurisdictional predicate of Article 62 to encompass questions of discoverability." *Wuterich III*, slip op. at 24 (Perlak, J., concurring in the result). Another two judges concluded that the quashals in this case were appealable, but expressed "grave concern at the continued expansion of Article 62." *Id.*, slip op. at 23 (Maksym, J., concurring).

These judicial expressions of concern—raised after both the CAAF's *Wuterich* opinion and this Court's *Denedo* opinion—highlight the continuing importance of the question presented. The military justice system's judiciary is calling out for additional guidance concerning the breadth of military appellate courts' jurisdiction. This Court should grant certiorari to provide that guidance.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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